84-300

No. _____

Office-Supreme Court, U.S.
FILED
JUN 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

S. JEFFREY BESSER
Petitioner,

v.

CHARLOTTE GREENFIELD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

S. Jeffrey Besser
Petitioner
In Pro Per

818 Felspar
Ridgecrest,
California 93555
619/375-3592

32 pp

QUESTION PRESENTED

Has Petitioner been deprived of due process of law because of the negligence, inability or refusal of a District Judge to timely hear a Motion for Extension of Time to File an Appeal (judge waited 45 days before granting motion)?

INDEX

Page

QUESTIONS PRESENTED ..... *i*

TABLE OF AUTHORITIES ..... *iii*

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT 3

FACTS 7

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 11

APPENDICES 13

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

Page

Guess v. Gulf Insurance Co., 94 N.M. 139, 607 P.2d 1157 (1980) 6

Marquez v. Wylie, 78 N.M. 544, 434 P2d 69 (1967) 5

Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399 (1970) 6

National Association for the Advancement of Colored People v. Alabama ex. rel. Flowers, Ala 1964, 84 S Ct. 7302, 377 U.S. 288, 12 LED2d 325, on remand 167 S.O. 2d 171, 277 Ala 89 10

12 New Mexico Law Review 147 (1982) 6

White v. Singleton, 88 N.M. 262, 539 P2d 1024 (Ct. App. 1975) 6

No. _____

IN THE

Supreme Court of the United States

October Term, 1984

S. JEFFREY BESSER
Petitioner,

v.

CHARLOTTE GREENFIELD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

S. JEFFREY BESSER, the Petitioner herein prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Mexico entered on March 20, 1984 (No. 15,279).

OPINIONS BELOW

The Final Decree of Dissolution of Marriage; the Decision and Findings of Fact in No. DR 82-924 in the District Court of Dona Ana County, New Mexico; the Order Extending Time for Appeal; the Notice of Appeal; the New Mexico Court of Appeals Calendaring Notice of No. 7531 to the Summary Calendar; the Memorandum in Opposition to Summary Disposition to the Court of Appeals concerning case #7531; the Memorandum Opinion of the Court of Appeals of the State of New Mexico, No. 7531; the affidavit of E. H. Williams, then attorney for Petitioner filed on Nov. 18, 1983; the Petition for Writ of Certiorari in the Supreme Court of the State of New Mexico; the Decision No. 15,279 of the Supreme Court of the State of New Mexico; the Motion to Enlarge Time and the Affidavit in Support of the Motion to Enlarge Time filed with the New Mexico Supreme Court; the Motion for Rehearing filed with the New Mexico Supreme Court; and the denial of the Motion for Extension to file Motion for Rehearing and Motion for Rehearing by the New Mexico Supreme Court have been certified and transmitted to the Clerk of the Supreme Court of the United States. (Xerox copies of these motions, memoranda and decisions have been forwarded with this petition.)

The Decision of the District Court of Dona Ana County, No. DR 82-924 is found at Appendix A.

The Memorandum Opinion (decision) of the Court of Appeals of the State of New Mexico is found at Appendix B.

The Decision of the Supreme Court of the State of New Mexico is found at Appendix C.

The Decision on the Motion for Extension to File a Motion for Rehearing and Motion for Rehearing from the Supreme Court of the State of New Mexico is found at Appendix D.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on March 20, 1984. The jurisdiction of this Court is invoked under 28 USC Section 1257 (3). The Motion for Extension to file Motion for Rehearing and Motion for Rehearing were denied by the Supreme Court of the State of New Mexico on July 13, 1984.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 34 of the Constitution of the State of New Mexico. Said provision reads as follows: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

Section I of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The federal due process question first arose in Petitioner's (then Respondent-Appellant's) Petition for Writ of Certiorari on page 6, paragraph 3, n:

> "n. Counsel for Respondent-Appellant, despite reasonable and diligent effort to obtain a hearing and as a result of conflicts in the Court's schedule and Petitioner-Appellee, was unable to obtain a hearing or an Order Extending the Time Within Which to Appeal. The Court's issuance of the Order of November 14, 1983, Extending the Time, demonstrates the Court's determination that the Motion to Extend Time was well taken, consequently, Respondent-Appellant has been deprived of his right of appeal and of due process of law resulting not only from the oversight of his attorney but also from the failure of the system to accommodate the requests for hearing of Respondent-Appellant and to act upon a pending Motion within forty-five (45) days from the date of its filing and in spite of two (2) written requests for hearing and the efforts of counsel for Respondent-Appellant by telephone to arrange a hearing and/or conference call."

The New Mexico Supreme Court quashed Petitioner's Writ of Certiorari, upholding the dismissal of Petitioner's appeal on the grounds that the trial court had not granted Petitioner's motion to extend time to appeal with the 60 days provided by Civ. App. Rule 3 (f), amended on January 1, 1983. The Motion for Extension of Time was filed on October 3, 1983. Petitioner's deprivation of due process occurred in further proceedings besides the trial judge's failure to hear the Motion within a reasonable period of time (Sept. 30 through Nov. 14). Due process was again denied by the Court of Appeal's failure to acknowledge the trial judge's verbal decision in a conference call (affidavits attached) on

Nov. 14, 1983, within the construed 60 day time limit. Due process was again denied by the Appellate Court's misapplication of Civ. App. Rule 202 and by the New Mexico Supreme Court's misapplication of Civ. App. Rule 3 (f). The language cited by both courts referred to rules or amendments enacted while Petitioner's case was pending and was, therefore, in violation of Article IV, Section 34 of the New Mexico State Constitution.

Petitioner moves this Court to allow his appeal on the following grounds:

1. The New Mexico Supreme Court quashed Petitioner's Writ of Certiorari, thereby upholding dismissal of the Petitioner's appeal on the grounds that the trial court had not granted Petitioner's motion to extend time to appeal within the 60 days provided by Civ. App. Rule 3 (f), amended on January 1, 1983.

2. The New Mexico Supreme Court specifically relied on the amendment added to Rule 3 (f) on January 1, 1983, citing the language: "Under Civ. App. Rule 3 (f), no motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered."

3. The New Mexico Supreme Court held that Article IV, Section 34, of the constitution of the State of New Mexico and Marquez v. Wylie, 78 N.M. 544, 434 P2d 69 (1967), required the application of Rule 3 (f) rather than Civ. App. Rule 202 to the Petitioner's case, because Rule 202 became effective after the filing date in Petitioner's case.

4. The New Mexico Supreme Court overlooked the fact that the 60 day provision itself was added to Rule 3 (f) effective January 1, 1983, subsequent to the filing date in Petitioner's case of September 29, 1982.

5. The New Mexico Supreme Court applied Marquez

and Section 34 appropriately but not to the proper extent. Petitioner's case and the trial judge's jurisdiction to extend the time for Petitioner's notice of appeal should have been reviewed pursuant to Civ. App. Rule 3 (f) prior to the January 1, 1983 amendment.

6. Under Rule 3 (f) without the January 1, 1983 amendment (but with the September 1, 1975 amendment), the appellate courts ultimately had to decide whether an extension of time for filing an appeal should be granted: Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d, 399 (1970), White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975), Guess v. Gulf Insurance Co., 94 N.M. 139, 607 P.2d 1267 (1980) and 12 New Mexico Law Review 147 (1982). The January 1, 1983 amendment relied upon by the Court in this decision removed the ultimate authority from the appellate courts by making the issue jurisdictional and providing for an automatic denial of an appeal after the expiration of the 60 day period. Because the 60 day automatic denial encompassed in the January 1, 1983 amendment was passed while Petitioner's case was pending, the appellate court must still ultimately decide whether or not the extension should be granted and still retains jurisdiction to make that determination.

7. Under Rule 3 (f) without the January 1, 1983 amendment, the trial court's order extending the time for the Petitioner to file his notice of appeal was a valid order and the notice of appeal was effective (not automatically denied), and the appeal was improperly dismissed.

8. In applying Civ. App. Rule 3 (f) with the inapplicable January 1, 1983 amendment, the New Mexico Supreme Court overlooked the fact that the trial judge advised all parties concerned on November 14, 1983 (the 60th day) that he agreed to extend the time for filing the appeal. (See affidavit of E. H. Williams, then attorney for then Respondent-Appellant, S. Jeffrey Besser). Therefore, even under the inapplicable Rule 3 (f) with the January

1, 1983 amendment used by the New Mexico Supreme Court, Petitioner had obtained the granting of the extension within the 60 day period.

FACTS

a. A final Decree of Divorce was entered in this cause on September 15, 1983.

b. Petitioner filed a Motion for Extension of Time Within Which to File Notice of Appeal dated September 30, 1983, setting forth as grounds the inadvertance of counsel for Petitioner and the lack of knowledge of counsel for Petitioner and the lack of knowledge of counsel for Petitioner of the revision and enactment of N.M.S.A. 1978 Crim. Child. Ct., Dom. Rel. and WW/C App. R202 (a) (Repl. Pamp. 1983).

c. On September 30, 1983, concurrently with the filing of a Motion for Extension of Time, Petitioner, through his attorney, wrote a letter to Judge Hughes requesting a Hearing on the Motion for Extension of Time.

d. On or immediately preceeding October 13, 1983, trial counsel for the Respondent notified trial counsel for the Petitioner of the withdrawal of Respondent's counsel and of the fact that Respondent was handling all further proceedings in the matter. Counsel for Petitioner then ascertained from Respondent that she would not agree to the entry of an Order Extending Time for Appeal.

e. On October 13, 1983, counsel for the Petitioner wrote Judge Hughes, advising him of the position of Respondent and requesting a hearing by Judge Hughes, pointing out that the Hearing on the Motion needed to be held prior to October 25, 1983.

f. The trial of the case in question occurred in Dona Ana County, New Mexico, but was heard by Judge

Hughes from Luna County, New Mexico, upon the recusal or disqualification of the Third Judicial District Judges.

g. In addition to the written letters hereinabove referred to, attorney for the Petitioner communicated on several occasions with the secretary for Judge Hughes attempting to arrange a hearing or telephone conference hearing to resolve the Motion, however, no hearing date, convenient to the Court and Respondent could be arranged. Counsel for Petitioner was available at the Court's convenience for such a hearing at all material times.

h. Counsel for Petitioner attempted to contact Judge Hughes' office on October 25, only to learn that he had left town on vacation or business and would be unavailable until later in November.

i. Petitioner's attorney then wrote to Judge Hughes on October 27 requesting a hearing upon the Judge's return to his office following his vacation or business trip.

j. During pertinent times, Judge Hughes, according to his secretary, was unavailable due to trial commitments in Deming, Silver City and Lordsburg, N.M. Petitioner's trial took place in Las Cruces, N.M.

k. A conference call was finally had with all parties and the Court on November 14, 1983, pursuant to which the Court entered an Order Extending the Time for Appeal and according to the extension of time set forth in said Order, Petitioner's Notice of Appeal was timely filed.

l. Apparently in November of 1982, the New Mexico Supreme Court adopted Rule 202 N.M.S.A. 1978, Crim. Child. Ct., Dom. Rel. and WW/C App. R202(a) (Repl.

Pamp. 1983). Publication of these rules was not made by the publishing company until they were shipped in August of 1983. At the time of the conclusion of this case, counsel for Petitioner was unaware of the revision of the rules reducing the time within which to appeal from thirty days to the ten days in Rule 202. Oversight of counsel was discovered fifteen days following the entry of the Final Decree herein and the Motion to Extend the Time was promptly filed and diligent efforts were made by counsel for Petitioner to obtain a hearing or other resolution of that Motion including two written requests to the Court requesting a hearing.

m. This matter arose within approximately three months following the effective date of the revised rule.

n. Counsel for Petitioner, despite diligent efforts to obtain a hearing, because of conflicts in the District Court's schedule and Respondent's, was unable to obtain a hearing or an Order Extending the Time Within Which to Appeal. The District Court's issuance of the Order of November 14, 1983, Extending the Time, demonstrates the Court's determination that the Motion to Extend Time was well taken, consequently Petitioner has been deprived of his right of appeal and of due process of law resulting not only from the oversight of his attorney but also from the failure of the system to accommodate the requests for hearing of Petitioner. Judge Hughes failed to act upon a pending Motion within forty-five days from the date of its filing and, in spite of two written requests for a hearing and the efforts of counsel for Petitioner by telephone to arrange a hearing and/or conference call, no decision was forthcoming until the 60th day following judgment.

It is urged that the Petitioner has no recourse from the refusal or inability of the District Court to act upon a timely filed Motion for Extension of Time.

REASONS FOR GRANTING THE WRIT

Both the Court of Appeals and the New Mexico Supreme Court misapplied statutes to the present case. The Court of Appeals inappropriately applied Rule 202. The New Mexico Supreme Court inappropriately applied the January 1, 1983 amendment to Rule 3 (f). Neither the Court of Appeals nor the New mexico Supreme Court acknowledge the decision made by Judge Hughes on the 60th day to Extend the Time for filing the appeal.

Petitioner's Motion to Enlarge the Time allowed for filing a Motion for Rehearing and Motion for Rehearing were denied by the Supreme Court of the State of New Mexico on July 13, 1984. Unless the Supreme Court of the United States grants a Writ of Certiorari, Petitioner will be without any legal recourse from the negligence of a District Judge in not hearing a Motion to Extend Time within forty-five (45) days from the date the motion was filed.

The U.S. Supreme Court in National Association for the Advancement of Colored People v. Alabama ex. rel. Flowers, Ala (1964), 84 S Ct. 7302, 377 U.S. 288, 12 LED2d 325, on remand 167 S.O. 2d 171, 277 Ala 89, held that when the substance and form of State procedural rules were complied with, the U.S. Supreme Court was not barred from reviewing a brief which failed to conform to the letter of Alabama Supreme Court rules. In the present instance, efforts by Petitioner to obtain an appeal complied with the substance and form of New Mexico State Supreme Court procedural Rules, therefore Petitioner urges this court to grant a Writ of Certiorari to remedy an injustice created by the negligence, inability or refusal of a District Judge to timely hear a Motion for Extension of Time to File an Appeal. Furthermore, a Writ of Certiorari should be granted to allow proper application of Article IV, Section 34 of the New Mexico State Constitution to the present case.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable court to review the judgment of the Supreme Court of New Mexico in S. Jeffrey Besser, Petitioner vs. Charlotte Greenfield, Respondent, No. 15279. In the event that Petition is granted, Petitioner prays that the Judgment of the Court Below be reversed, and that the appeal of Petitioner be allowed to proceed.

DATED June 17, 1984.

S. Jeffrey Besser
Petitioner
In Pro Per

818 Felspar
Ridgecrest,
California 93555
619/375-3592

APPENDICES

IN THE DISTRICT COURT OF
DONA ANA COUNTY, NEW MEXICO

CHARLOTTE GREENFIELD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
S. JEFFREY BESSER,	)	
	)	
Respondent.	)	
	)	NO. DR 82-924

DECISION

THIS MATTER was tried on May 11 and 12, 1983 with some documentary evidence to be submitted later and arguments and briefs to be submitted as well as requested findings of fact and conclusions of law. This having been accomplished the Court enters its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

(1) The parties were married October 15, 1971, in Colorado and have been since that date husband and wife.

(2) Both parties are residents of Dona Ana County, N.M., and have resided in the state for more than six (6) months immediately preceding the filing of this action.

(3) No children have born of the marriage and none is expected.

(4) The parties separated on or about April 18, 1982, due to discord between them and conflict of personalities

which has destroyed the legitimate ends of the marriage and there is no reasonable expectation of reconciliation.

(5) Petitioner is an attorney engaged in the private practice of law as a sole practitioner in Las Cruces, N.M., having received her law degree from the University of Michigan Law School in 1968, and being admitted to practice and having practiced in New York and Colorado in addition to New Mexico.

(6) Respondent is a certified Psychologist and is employed by a mental health center and also engaged in private practice as a counseling clinical Psychologist in Las Cruces, N.M., having received his doctorate degree from Colorado State University in 1978; in addition, respondent has a law degree from the University of Michigan Law School in 1969, but has not practiced law nor admitted to practice.

(7) Both parties are in good health and able to provide for themselves without assistance from the other.

(8) Prior to their marriage the parties cohabited for approximately two (2) years during which time they kept their earnings separately and shared living expenses as nearly equally as possible but maintained separate bank and saving accounts from which each paid his or her purchases and debts as made and created by them respectively.

(9) The marriage did not change this financial arrangement adhered to by the parties with each party maintaining separate bank and savings accounts which were not commingled with the joint funds and accounts, and neither party accounted to the other for dispursements made from their separate accounts.

(10) Each party acted with full knowledge and acquiescence of the other party maintaining separate accounts and the purchase of assets there from were considered the separate property of the one making the purchase.

(11) During the marriage petitioner inherited $14,000.00 which she did not commingle with joint funds from part of which she has acquired the Southwest Bell corporate bond and Municipal Fund shares.

(12) Considering funds transmuted into separate funds of each of the parties, and equitable division of their community and joint owned property is:

Petitioner should take as her separate property:

(a) The Hill property and assume and pay the mortgage lien indebted thereon;

(b) Two-thirds undivided interest in the Woodford property and assume and pay two-thirds of the expenses and mortgage lien indebtedness thereon;

(c) The household furnishings and related items of personal property located on the Hill property, subject to any indebtedness thereon;

(d) Two-thirds undivided interest in the furnishings and related items of personal property located on the Woodford property, subject to two-thirds of any expenses and indebtedness thereon;

(e) Her professional law practice and all related assets and obligations thereof;

(f) Bank and savings accounts in her name;

(g) Motor vehicles(s) in her possession; and

(h) Her personal clothing and effects.

Respondent should take as his separate property:

(a) The Van Patten property and assume the balance due on the purchase price;

'(b) One-third undivided interest in the Woodford property and assume and pay one-third of the expenses and mortgage lien indebtedness thereon;

(c) The household furnishings and related items of personal property located on the Van Patten property subject to any indebtedness thereon;

(d) One-third undivided interest in the furnishings and related items of personal property located on the Woodford property, subject to one-third of any expenses and indebtedness thereon;

(e) His professional psychology practice and all related assets and obligations thereof;

(f) Bank and savings accounts in his name;

(g) Motor vehicles in his possession; and

(h) His personal clothing and effects.

(13) Respondent attended school during much of the time the parties were married and during such times petitioner contributed to the joint account and joint support and living expenses in amounts considerably more than contributed by respondent.

(14) Respondent's doctorate did not enhance his ear-

ning capacity, and was of no value to the community.

(15) The 1982 income tax obligation should be paid or refunded in direct proportion to their respective reportable income and each receive credit toward his or her prorate portion for taxes he or she has paid.

(16) No rentals are due from one party to the other use of the residences during their separation.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the cause of action.

2. Petitioner is entitled to a divorce on the grounds of incompatibility.

3. Even though petitioner worked and helped support respondent during a considerable portion of the marriage while he attended school, does not entitle her to alimony as a means of reimbursement or pay back for her monetary contributions for his benefit.

4. The Southwest Bell corporate stock and Municipal Fund shares are petitioner's separate property.

5. The earnings of both parties during the marriage going into their separate accounts was by implied agreement transmuted into the separate funds of the respective parties.

6. The bank and savings accounts of each party in his or her name separately is the separate property of that party respectively.

7. The funds of petitioner inherited during marriage are her separate property.

8. It is proper to consider the separate funds of petitioner and the transmuted funds and property of each of the parties in making a division of their properties, and after considering same an equitable division between them is as set forth above, and each of the parties should execute and deliver all instruments necessary and proper to effect the foregoing division of their properties.

9. Each of the parties should pay his and her own attorneys fees and costs of this action.

10. All requested findings of fact and conclusion of law inconsistant with the above are hereby refused.

DATED this 8th day of August, 1983.

RAY HUGHES
DISTRICT JUDGE
DIVISION II

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CHARLOTTE GREENFIELD,

Petitioner-Appellee,

vs. No. 7531

S. JEFFREY BESSER,

Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT
OF DONA ANA COUNTY

Ray Hughes, Judge

Charlotte Greenfield
Atkinson & Kelsey
Albuquerque, New Mexico

Attorneys for Petitioner-Appellee

E. H. Williams
Las Cruces, New Mexico

Attorney for Respondent-Appellant

MEMORANDUM OPINION

NEAL, Judge

Husband appeals a decree of dissolution entered on September 15, 1983. We calendared the case for summary dismissal. Husband has filed a timely memorandum in opposition. Not being persuaded that husband's notice of appeal was timely filed, we dismiss this appeal.

A notice of appeal must be filed within ten (10) days after the filing of the order appealed from. NMSA 1978, Crim.,Child.Ct.,Dom.Rel.&W/Civ.App.Rule 202(a) (Repl.Pamp. 1983) In the event that the trial court entertains a motion for extension of time within which to file a notice of appeal, "[n]o motion for an extension of time to file a notice of appeal may be granted after forty days from the time the appealable order is entered." This rule is applicable to appeals of final orders entered on or after June 17, 1983, in matters concerning dissolution of marriage. NMSA 1978, Crim.,Child.Ct.,Dom.Rel. & W/C App.R. 101(C) (Repl.Pamp.1983). See also 22 S.B.B. 495. Thus, regardless of the circumstances which led to the trial court's failure to enter an order extending time within which to file a notice of appeal within forty days from the date of the judgement appealed from, this Court is without jurisdiction to hear this appeal because of husband's failure to file a timely notice of appeal. State v. Martinez, 84 N.M. 766, 508 P.2d 36 (Ct.App. 1973); Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968).

Therefore, this appeal is dismissed.

IT IS SO ORDERED.

C. Fincher Neal, Judge

WE CONCUR:

Mary C. Walters, Chief Judge

Joe W. Wood, Judge

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ARNOLD STONE,

Petitioner,

vs. No. 15,159

KATHERINE STONE,

Respondent.

PORFIRIO MENDOZA,

Petitioner,

vs. No. 15,241

LUPE A. MENDOZA (URBAN),

Respondent.

S. JEFFREY BESSER,

Petitioner,

vs. No. 15,279

CHARLOTTE GREENFIELD,

Respondent.

ORIGINAL PROCEEDINGS ON CERTIORARI

DECISION

STOWERS, Justice.

Three petitions on writs of certiorari are before this Court to review the decisions and orders of the Court of

Appeals. Due to the similarity of the issues raised, the three petitions have been consolidated. The Court of Appeals dismissed the appeals on the basis of NMSA 1978, Crim., Child. Ct., Dom.Rel. & W/C App. Rules 101(a) and 202(a) (Repl.Pamp.1983). We reverse the Court of Appeals as to Stone v. Stone, Ct.App. No. 7382 (Filed September 23, 1983) and Mendoza v. Mendoza, Ct.App. No. 7461 (Filed November 15, 1983). The writ of certiorari heretofore issued in Greenfield v. Besser, Ct.App. No. 7531 (Filed December 20, 1983) is quashed.

The issue presented by all three cases on certiorari concerns the applicability of the newly revised Crim.,Child.Ct.,Dom.Rel. & W/C App. Rules 101(a) and 202(a) and whether the application of the Rules to the facts in the three cases before us constitutes a violation of N.M. Const. Article IV, Section 34.

In Stone v. Stone, husband filed a petition to reduce alimony on October 19, 1982. On July 20, 1983, the district court denied the petition and also filed its findings of fact and conclusions of law. Husband filed a notice of appeal with the Court of Appeals on August 18, 1983. Wife filed a notice of cross-appeal on August 29, 1983. Wife subsequently filed a motion to dismiss with the Court of Appeals, arguing that husband should have filed his notice of appeal under Crim., Child. Ct., Dom. Rel. & W/C App. Rule 202(a). Wife's motion to dismiss was granted.

The second case, Mendoza v. Mendoza, concerned a motion for a partition of property. In Mendoza, a petition for dissolution of marriage was filed in 1974. Judgment was entered on July 18, 1984 dissolving the marriage and granting the community real property to the parties as tenants in common. In 1981, a motion was filed for a partition of the property. A hearing on the motion was held on May 11, 1983. Findings of fact and conclusions of law

were filed and an order for partition was entered on August 23, 1983. The notice of appeal was filed on September 22, 1983. The Court of Appeals proposed summary dismissal because the notice of appeal was not filed within ten days of entry of the district court's decision. A memorandum in opposition to summary dismissal was filed; however, the Court of Appeals subsequently entered its order dismissing the appeal.

Greenfield v. Besser also concerns the timeliness of a notice of appeal and in particular an order extending the time within which to appeal. In Greenfield, the wife filed a petition for dissolution of marriage on September 29, 1982. A final decree of divorce was filed on September 15, 1983. The record indicates that the husband filed a motion for extension of time within which to file an appeal on October 3, 1983. After numerous attempts to schedule a hearing or conference call to decide the issues raised by the motion, a conference call hearing was held on November 14, 1983. On November 15, 1983, the trial court extended the time for husband to file his notice of appeal to November 18, 1983. The notice of appeal was subsequently filed on November 18, 1983. The Court of Appeals calendared the case for summary dismissal. Husband filed a timely memorandum in opposition. However, not being persuaded that husband's notice of appeal was timely filed, the Court of Appeals dismissed the case.

On April 15, 1983, this Court revised Rule 101 and ordered that the amendment of Rule 101 "shall be effective for all appeals from orders or judgements entered on or after June 17, 1983." See 22 SBB 495. The revisions of Rule 101 expanded the scope of the rules of appellate procedure, making them applicable to domestic relations matters as well as other types of cases. Consequently, because of the expanded scope of the Rules, Rule 202 became the rule to be followed regarding time for filing the notice of appeal in domestic relations cases rather

than NMSA 1978, Civ.App. Rule 3 (Cum.Supp.1983). Rule 202(a) requires that the notice of appeal shall be filed within 10 days after the filing of the judgment or order appealed from. Civ.App. Rule 3(a) requires an aggrieved party to file their appeal within thirty days.

The petitioners in Stone and Mendoza contend that N.M. Const. Article IV, Section 34 prohibits the change of rules of procedure in pending cases. Article IV, Section 34 states:

> No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

The intention of Article IV, Section 34 was discussed in Stockard v. Hamilton, 25 N.M. 240, 180 P. 294 (1919). In Stockard, it was noted that the intention of the constitutional provision was to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the State. The purpose of the provision was to cure past methods of winning cases by changing rules of evidence and procedure during the case.

Although Stockard discussed the constitutional provision as it applies to legislative enactments, State v. Hall, 40 N.M. 128, 55 P.2d 740 (1935) implied that the Court regarded rule changes in a pending case to be similarly prohibited by the Consitution. We have subsequently held that the provision also applies to rules adopted by this Court. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967). See also State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct.App.1977); State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct.App.1977).

This Court has previously considered the issue of the applicability of a changed rule of procedure to actions or proceedings pending when the rule went into effect. In Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966), the Legislature amended a rule of civil procedure to extend from two to three years the time for taking action to bring a proceeding to final determination. This Court held that the amended rule of civil procedure was not applicable to an action pending at the time of the effective date of the amendment. The Court concluded that the action was therefore subject to dismissal for failure to bring it to final determination within two years. See also Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

A change in judicial rules was discused in Marquez v. Wylie. The rule change as applied to that case had the effect of extending the time for filing a motion for new trial from ten to twelve days. Appellants in that case argued that the change of rules is not a "change in procedure." Noting that such an argument was fallacious, the Court stated that "the court could no more extend the time for the filing of a motion for new trial in a pending case than it could shorten the time." Marquez v. Wylie at 546, 434 P.2d at 71. The Court concluded that this was a change in procedure and was prohibited by the constitutional provision.

Similarly, in the three cases before us, the rule change has the effect of shortening the time for appeal from thirty days to ten days, and is therefore a change in procedure. Because the facts of the cases indicate that they were pending cases before the effective date of the rule change, we must determine whether they were timely filed under Civ.App. Rul 3. In both Stone and Mendoza, the notices of appeal were filed within the Thirty (30) day period provided under Civ.App. Rule 3(a)

and were therefore timely. However, in Greenfield the time allowed for filing a notice of appeal had expired despite the three day extension. Under Civ.App. Rule 3(f), "[n]o motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered." The appeal in Greenfield was not timely filed because the appealable order was entered on September 15, 1983, and the notice of appeal was filed on November 18, 1983, after the 60 day period had elapsed. This rule is to be strictly construed to prevent its progressive erosion to the point that attorneys will assume that they have 60 days within which to file the notice of appeal. Guess v. Gulf Insurance Co., 94 N.M. 139, 607 P.2d 1157 (1980).

We therefore reverse the Court of Appeals as to Stone and Mendoza and remand these cases to the Court of Appeals to consider the appeals. We hereby quash the writ of certiorari issued in Greenfield as having been improvidently granted.

This decision is not to be published or cited as precedent.

IT IS SO ORDERED.

HARRY E. STOWERS, JR., Justice

WE CONCUR:

WILLIAM R. FEDERICI, Chief Justice

DAN SOSA, JR., Senior Justice

WILLIAM RIORDAN, Justice

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Friday, July 13, 1984

No. 15,279

S. JEFFREY BESSER,

Petitioner,

vs.

CHARLOTTE GREENFIELD,

Respondent.

This matter coming on for consideration by the Court upon Motion for extension to file Motion for Rehearing, and Motion for Rehearing, and the Court having considered said motions and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for extension to file Motion for Rehearing, and Motion for Rehearing are hereby denied.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico

84-300

Office - Supreme Court, U.S.
FILED
SEP 7 1984
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

S. JEFFREY BESSER,

Petitioner,

vs.

CHARLOTTE GREENFIELD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

ON APPEAL FROM
THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION

Charlotte Greenfield
250 South Downtown Mall
Las Cruces, New Mexico 88001
(5050 524-8514

pro se

BEST AVAILABLE COPY

32 P

TABLE OF CONTENTS

Table of Authorities i

Text of New Mexico Rules of Appellate Procedure iv

Statement of Case 1

Summary of Argument 2

Argument

A. Petitioner's Notice of Appeal Was Not Timely Filed 3

B. Petitioner's Counsel Did Not Pursue Available Alternatives 11

C. Questions Asserted by Petitioner Were Not Raised in the State Courts 13

D. State Court's Denial of Certiorari Rests Upon State Procedural Grounds 16

Conclusion 19

TABLE OF AUTHORITIES

	Page
A. Cases	
Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 61 L.ed 476, 37 S.Ct. 188 (1917)	14
Bouldin v. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967)	10
Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 47, 600 P.2d 1207 (1979), cert. d. 93 N.M. 205, 598 P.2d 1165	9
Broad River Power Co. v. South Carolina, 281 U.S. 537, 74 L.ed 1023, 50 S.Ct. 401 (1930)	19
Cardinale v. Louisiana, 394 U.S. 437, 22 L.ed 2d 398, 89 S.Ct. 1162 (1969)	14,15
Fuller v. Oregon, 412 U.S. 40, 40 L.ed 2d 642, 94 S.Ct. 2116 (1974)	15
Gonzales v. City of Albuquerque, 90 N.M. 785, 568 P.2d 621 (1977)	9,10
Guess v. Gulf Ins. Co., 94 N.M. 139, 607 P.2d 1157 (1980)	9
John v. Paullin, 231 U.S. 583, 58 L.ed 381, 34 S.Ct. 178 (1913)	18,19
Johnson v. Johnson, 74 N.M. 567, 396 P.2d 181 (1964)	10

Marquez v. Wylie, 78 N.M. 548, 434 P.2d 69 (1967) 6

McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 58 L.ed 2d 1145, 34 S.Ct. 772 (1914) 19

N.A.A.C.P. v. Alabama, 377 U.S. 288, 12 L.ed 2d 325, 84 S.Ct. 1302 (1964) 17,18,19

New Mexico Savings & Loan Ass'n v. Blueher Lumber Co., 80 N.M. 254, 454 P.2d 268 (1969) 9

Nickel v. Cole, 256 U.S. 222, 65 L.ed 900, 41 S.Ct. 467 (1921) 19

Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L.ed 1149, 17 S.Ct. 709 (1897) 14

Parker v. Illinois, 333 U.S. 571, 92 L.ed 886, 68 S.Ct. 708 (1948) 19

Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968) 9

State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967) 9

Staub v. City of Baxley, 355 U.S. 313, 2 L.ed 2d 302, 78 S. Ct. 277 (1958) 18

Webb v. Webb, 451 U.S. 493, 68 L.ed 2d 392, 101 S.Ct. 1889 (1981) 14

White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (1975) 12

B. Constitutional Provisions

Article IV, Section 34, New Mexico State Constitution 6

Article II, Section 18, New Mexico State Constitution 13

First Amendment, United States Constitution 18

Fourteenth Amendment, United States Constitution 13

C. Statutes

28 U.S.C. §1257 (C) 13

D. Treatices

Moore's, Federal Practice, §204.13(2) 8

12 New Mexico Law Review 148 12

TEXT OF NEW MEXICO RULES OF APPELLATE PROCEDURE

Rule 3(a), Rules of Appellate Procedure for Civil Cases

In civil actions, any party aggrieved may appeal to the appropriate appellate court within thirty days after entry of:

(1) any final judgment or decision;

(2) any interlocutory order or decision which practically disposes of the merits; (findings of fact, conclusions of law and written opinions are not deemed interlocutory orders or decisions which practically dispose of the merits.)

(3) any final order after entry of judgment which affects substantial rights; or

(4) judgment in any proceeding for civil contempt. Additional time for taking a cross-appeal may be available under Rule 4(c).

Rule 3(f), Rules of Appellate Procedure for Civil Cases

Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing the notice of appeal or application for an order allowing an appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. [As amended, effective September 1, 1975].

Rule 3(f), Rules of Appellate Procedure for Civil Cases, as amended January 1, 1983:

Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing the notice of appeal or application for an order allowing an appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. No motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered. If the motion is not granted within the 60 days,

the motion is automatically denied. [As amended, effective September 1, 1975 and January 1, 1983.]

Rule 19(a), Rules of Appellate Procedure for Civil Cases

A motion for rehearing may be filed within fourteen days after entry of the appellate court's decision, or any subsequent modification of its decision or opinion, unless the time is shortened or enlarged by order. The motion shall state briefly and with particularity but without argument the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended. If the motion is based upon a point of law or fact not raised, briefed or argued by any party but relied upon by the court in its disposition of the matter, the motion shall specifically so state,[and] shall be accompanied by a brief in support thereof. If the court grants the motion for rehearing, opposing parties shall be allowed ten days within which to respond. In all other cases the movant

may, but is not required to, file a brief in support of the motion at the time it is filed but no response will be received unless requested by the court. Oral argument on the motion will not be permitted unless ordered by the court. If a motion for rehearing is granted the clerk shall give notice thereof and any party may, or, if the court directs, shall, within ten days after notice, file a brief addressed solely to the issue specified in the order granting rehearing. There shall be no other briefs or argument unless the court shall otherwise direct.

STATEMENT OF CASE

Greenfield v. Besser, a divorce case, was filed in the District Court, in Dona Ana County, New Mexico on September 29, 1982. A Final Decree of Dissolution of Marriage was filed September 15, 1983. (R 89-95). Petitioner filed, on October 3, 1983, a Motion for Extension of Time Within Which to File Notice of Appeal. (R 96-7) A hearing was held on Petitioner's Motion on November 14, 1983. (R 100) On November 18, 1983, the sixty-fourth day after entry of the decree, both an Order Extending Time and Petitioner's Notice of Appeal were filed. (R 111,112)

Petitioner appealed to the state appellate courts, which held that they lacked jurisdiction, because Petitioner's Notice of Appeal was not timely under New Mexico appellate procedural rules.

SUMMARY OF ARGUMENT

The decision of the New Mexico Supreme Court to dismiss Petitioner's appeal was based on its finding that Petitioner's Notice of Appeal was not timely, under New Mexico appellate rules. That decision was legally correct, according to long-standing New Mexico requirements, even under the appellate rule which Petitioner urges be applied.

Petitioner's counsel, when faced with the onset of the appeal deadline, did not pursue alternative remedies, and Petitioner cannot now argue that the deadline of the appellate rule imposed impossible obstacles.

Petitioner failed to raise both New Mexico and Federal questions at the state court level, and the Supreme Court should decline to review issues not argued or decided by the state courts. The New Mexico Supreme Court's decision was based,

in its entirety, upon non-federal jurisdictional grounds, applied in the usual manner in the instant case. It is the province of the state to establish its own appellate procedures, and certiorari should be denied.

ARGUMENT

A. Petitioner's Notice of Appeal Was Not Timely Filed

In Greenfield v. Besser, the Final Decree of Dissolution of Marriage was entered by the District Court of Dona Ana County, New Mexico on September 15, 1983. (R 89-95). Petitioner's counsel filed a Motion for Extension of Time Within Which to File Notice of Appeal on October 3, 1983. (R 96-7). Despite attempts by Petitioner's counsel, no hearing was held on the motion until November 14, 1983, 60 days after entry of the Final Decree. (R 100). The district judge orally informed the parties on November 14th that he would

grant Petitioner an extension until November 18th to file his Notice of Appeal. The Order reflecting this decision was dated November 15th, but was not filed until November 18th.(R 111) Notice of Appeal was filed November 18, 1983, the 64th day after the date of the Final Decree.

The Supreme Court of New Mexico adopted, on November 17, 1983, several amendments to the Rules for Appellate Procedure affecting civil cases, and domestic relations cases in particular. Among the rule changes was the application of a new rule in domestic relations matters, Rule 202(e), which shortened the period within which a notice of appeal had to be filed to 10 days after the date of the final judgment, order or decree appealed from. The previous rule had allowed 30 days. A new rule, 202(c), permitted the filing of a motion for

extension of time within which to file a notice of appeal, but provided specifically that

> Upon good cause shown the district court may, before or after the time has expired, whether or not a notice of appeal has been filed, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by these rules. No motion for extension of time to file the notice of appeal may be granted after 40 days from the time the appealable order is entered. ... If the motion is not granted within the 40 days, the motion is automatically denied. Rule 202(c)

On appeal, the New Mexico Court of Appeals, the intermediate appellate court, dismissed the appeal, stating in its Memorandum Opinion that under Rule 202(a) and (c) Petitioner's Notice of Appeal was not timely filed. Petitioner then applied to the Supreme Court of New Mexico, which initially granted certiorari.

The Supreme Court agreed that the

appellate courts lacked jurisdiction and dismissed Petitioner's appeal but cited other grounds for its decision. The State Supreme Court ruled, in the instant case and in two others with which it was consolidated, that the new appellate rules, enacted in November 1982, could not be applied in cases filed prior to November 1982, because of Article IV, Section 34 of the state constitution which states:

> No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

This constitutional provision applies to rules adopted by the State's highest court. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967). The court therefore held that the Rules of Appellate Procedure for Civil Cases, applicable before November 1982, would govern the timeliness of appeals, and on that basis permitted

appeals in the two companion cases. Greenfield v. Besser, originally filed in September 1982, the Court held, was governed by the former rules as well, but because Petitioner's Notice of Appeal had been filed "after the 60-day period had elapsed" it was not timely filed under those rules, and the appeal was not permitted. It is that determination that Petitioner now appeals. (Petitioner's Petition for Writ of Cert., Appendix A, pp 30-35)

The New Mexico Supreme Court in its written decision quotes part of the former rule, Rule 3(f) of the Rules of Appellate Procedure for Civil Cases, but mistakenly quotes the rule as it was amended in January 1983, stating "no motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered." (Decision p.5) Petitioner is correct that

the amendment to the rule should not, constitutionally, have been applied. However, the 1983 amendment made no substantive change in Rule 3(f) which would change the outcome in the instant case. Rule 3(f) prior to its 1983 amendment read:

> Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing the notice of appeal or application for an order allowing an appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. (Emphasis added)

To quote Moore's Federal Practice, §204.13 (2), when characterizing similar language in the 1968 version of Rule 4(a) of the Federal Rules of Appellate Procedure,

> a straightforward reading of this language would require that a request for extension of time, and its grant, would have to take place within 30 days after expiration of the normal period.

Since Rule 3(a), applicable for several years before 1983, set a 30-day regular period for filing notices of appeal, if an extension were obtained under Rule 3(f), the maximum period would be 60 days after the date of the judgment. That immovable limit has been uniformly upheld by the New Mexico Court of Appeals and Supreme Court. Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 417, 600 P.2d 1207 (1979), cert. d., 93 N.M. 205, 598 P.2d 1165; New Mexico Savings & Loan Ass'n v. Blueher Lumber Co., 80 N.M. 254, 454 P.2d 268 (1969); Guess v. Gulf Ins. Co., 94 N.M. 139, 607 P.2d 1157 (1980).

Filing of a timely notice of appeal is jurisdictional. State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967), Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968); Gonzales v. City of Albuquerque, 90 N.M. 785, 568 P.2d 621 (1977). In

so far as jurisdiction is concerned, it is not a discretionary matter. Johnson v. Johnson, 74 N.M. 567, 396 P.2d 181 (1964). Even though the district court might find, as happened here, good cause or excusable neglect to justify the granting of an extension, if no notice of appeal is filed until after the expiration of the 60-day maximum period, the order and notice have no effect. Gonzales v. City of Albuquerque, supra. It is not the holding of a hearing or orally announcing a decision within 60 days, as Petitioner contends, which satisfies the jurisdictional requirement. (Petition for Writ of Cert. pp 3,10,16-7) The act which the rule requires to be timely is the filing of the notice of appeal. Bouldin v. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967)

Petitioner's Notice of Appeal, not being filed until the 64th day after entry of the Final Decree, was not timely,

and the Supreme Court of New Mexico, under the pre-1982 rule Petitioner urges be applied, was correct in dismissing the appeal.

B. Petitioner's Counsel Did Not Pursue Available Alternatives

Petitioner argues that he was foreclosed arbitrarily and unfairly by a state procedural rule imposing a 60-day limit due to the fact the district judge could not hold a hearing within the time limit. However, several alternatives were available, which counsel for Petitioner failed to pursue. First, since the Motion for Extension was filed within the initial 30-day period, both pre and post 1983 versions of the appellate rule permit an order extending time to be entered ex parte, without a hearing. "[I]n so far as a motion for extension may be filed before the time for filing the notice has expired, the rule actually contemplates

ex parte proceedings so long as service of notice of those proceedings is otherwise made." White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (1975) Secondly, the signing of the order granting extension by an alternative judge within the district might have been requested. Thirdly, as suggested by a writer in the New Mexico Law Review in 1982,

> Rule 3(f) limits the power of the district court to grant an extension to an additional 30 days from the date by which the notice of appeal must be filed. If the district court did not rule on the motion until more than sixty days after the judgment was rendered, it would lack authority to permit a subsequent filing of a notice of appeal. To overcome this problem, counsel should follow the practice adopted here: file the motion for extension together with a "protective" notice of appeal within 60 days after entry of a judgment. If the court grants the motion, the pre-filed notice of appeal becomes valid and is deemed to have been timely filed. 12 N.M.L. Rev. 148, f. 309.

Counsel for Petitioner attempted none of these measures.

C. Questions Asserted by Petitioner Were Not Raised in the State Courts

The jurisdiction of the Supreme Court is asserted by Petitioner under 28 U.S.C. §1257(c) which permits the Supreme Court to review decisions of the highest state courts where the validity of a state statute (here, procedural rule) is drawn into question "on the ground of its being repugnant to the Constitution...of the United States." The New Mexico rule of appellate procedure, Petitioner alleges, violates Section 1 of the Fourteenth Amendment to the United States Constitution, the due process clause. Article II, Section 18 of the New Mexico Constitution also prohibits the taking of life, liberty or property "without due process of law." Petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, written by Petitioner's counsel, makes only the most general reference to

"his right of appeal" and "due process of law," without referral to either the U.S. or New Mexico Constitutions, or any case or statutory citations. (Appendix H, to Petition for Writ of Cert., p.61) Neither the Memorandum Decision by the New Mexico Court of Appeals or the Decision written by the state Supreme Court addresses the constitutional issue. Petitioner has failed to "specially" and "unmistakably" declare that he asserted United States Constitutional protections, and this Court should not hear or decide federal Constitutional issues raised for the first time. Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L.ed 1149 17 S.Ct. 709 (1897), Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 61 L.ed 476, 37 S.Ct. 188 (1917); Cardinale v. Louisiana, 394 U.S. 437, 22 L.ed 2d 398, 89 S.Ct. 1162 (1969), Webb v. Webb, 451 U.S. 493,

68 L.ed 2d 392, 101 S.Ct. 1889 (1981) "The Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." As Justice White explained, it is important

> that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Cardinale v. Louisiana, supra.

Fuller v. Oregon, 417 U.S. 40, 40 L.ed 2d 642, 94 S.Ct. 2116 (1974)

Additionally, Petitioner failed to timely assert, to the Supreme Court of the State of New Mexico, the error he now asserts to this Court, since no timely Motion for Rehearing was filed. Rule 19 of the New Mexico Rules of Appellate Procedure in Civil Cases provides that a motion for rehearing at the appellate court level must be filed

within 14 days after the decision, "unless the time is ...enlarged by order.. .." Petitioner's Motion to Enlarge Time was not filed with the Clerk of the Supreme Court of New Mexico until June 25, 1984, over 90 days after the Supreme Court decision. Petitioner's Motion to Enlarge Time has not, as of this date, been acted upon. If the "error" committed would result in a change in outcome, the New Mexico Supreme Court should first have been given an opportunity to correct its mistake.

D. State Court's Denial of Certiorari Rests Upon State Procedural Grounds

The decision of the New Mexico Supreme Court dismissing Petitioner's appeal was based on non-federal grounds, namely Petitioner's lack of compliance with a jurisdictional requirement of the rules of appellate procedure. As shown in section A of this Argument, the applicable procedural

rule is uniformly held to impose an absolute requirement that a notice of appeal be timely filed. Timeliness is a jurisdictional condition to bringing an appeal. Petitioner makes no case that the state rule was applied to him either uniquely or discriminatorily. Nor does he assert that the state court employed the procedural requirement in order to stifle a federal claim. Yet Petitioner cites N.A.A.C.P. v. Alabama, 377 U.S. 288, 12 L.ed 2d 325, 84 S.Ct. 1302 (1964), as precedent for his argument that the United States Supreme Court may review the application and interpretation of state procedural rules by state courts. Petitioner ignores the profound factual differences involved in the two situations. Not only was the NAACP faced with the "permanent denial of the right to associate for the advocacy of ideas by lawful means," but it was apparent to

the Court that the state of Alabama had perverted the state law, by imposing a penalty upon the NAACP without statutory basis or judicial precedent, and by asserting a novel and unprecedented application of a procedural rule with "pointless severity" having as its very purpose the thwarting of Supreme Court review of "unquestioned Constitutional rights" under the First and Fourteenth Amendments. NAACP v. Alabama, supra, at 332,335,338-9.

The New Mexico Supreme Court, in the instant case, applied a generally recognized non-federal jurisdictional rule setting a time limit for bringing appeals. It, as Justice Frankfurter stated,

> rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise. Staub v. City of Baxley, 335 U.S. 313,2 L.ed 2d 302, 78 S.Ct. 277 (1958) (dissenting opinion); John v. Paullin,

231 U.S. 583, 58 L.ed 381, 34 S.Ct. 178 (1913); McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 58 L.ed 2d 1145, 34 S.Ct. 772 (1914)

Unless the state court has perverted the state procedural rule, as the Supreme Court found in N.A.A.C.P. v. Alabama, or unless the litigant is denied a reasonable channel of appeal, no federal question is presented, and the decision by the state court will not be reviewed. Broad River Power Co. v. South Carolina, 281 U.S. 537, 74 L.ed 1023, 50 S.Ct. 401 (1930); Nickel v. Cole, 256 U.S. 222, 65 L.ed 900, 41 S.Ct. 467 (1921); Parker v. Illinois, 333 U.S. 571, 92 L.ed 886, 68 S.Ct. 708 (1948).

CONCLUSION

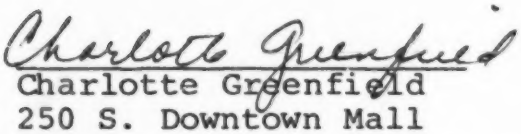
No properly raised federal question is presented by the Petition for Writ of Certiorari in this matter. The only federal question, denial of due process, was not specially raised or argued by Petitioner at the state court level, and

the opinion of the New Mexico Supreme Court does not even touch upon the federal or constitutional issue. Even if properly preserved for review by the Supreme Court, Petitioner failed to follow a long-standing jurisdictional requirement, that a timely notice of appeal be filed, and the Supreme Court of New Mexico correctly decided the case on non-federal procedural grounds.

It is apparent, therefor, that the federal question which the Petitioner seeks to bring to the consideration of the United States Supreme Court is wholly without merit and is one which has already been foreclosed by prior decisions of the Court. Appellee requests that certiorari be denied, or, in the alternative, that the

decision of the New Mexico Supreme Court be affirmed.

Respectfully submitted,



Charlotte Greenfield
250 S. Downtown Mall
Las Cruces, New Mexico
88001
pro se